

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Apr 22, 2019

SEAN F. MCAVOY, CLERK

PAUL S.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 2:18-CV-00132-JTR

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF Nos. 13, 14. Attorney Lora Lee Stover represents Paul S. (Plaintiff); Special Assistant United States Attorney Justin Lane Martin represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 7. After reviewing the administrative record and briefs filed by the parties, the Court **DENIES** Plaintiff's motion for summary judgment and **GRANTS** Defendant's motion for summary judgment.

JURISDICTION

Plaintiff filed applications for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB) on October 22, 2014, Tr. 201, 209, alleging disability since January 1, 2000, Tr. 315, 324, due to multiple mental health issues, depression, anxiety, posttraumatic stress disorder (PTSD), and a back disorder, Tr.

361. The applications were denied initially and upon reconsideration. Tr. 243-50, 253-59. Administrative Law Judge (ALJ) Stewart Stallings held a hearing on August 18, 2016 and heard testimony from Plaintiff, medical expert Stephen Rubin, Ph.D., and vocational expert K. Diane Kramer. Tr. 162-200, 429. At the hearing, Plaintiff amended his alleged date of onset to October 22, 2014 and withdrew his request for a hearing on the DIB application. Tr. 165-66. The ALJ issued an unfavorable decision on October 17, 2016. Tr. 93-105. The Appeals Council denied review on March 9, 2018. Tr. 1-6. The ALJ's October 17, 2016 decision became the final decision of the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §§ 405(g), 1383(c). Plaintiff filed this action for judicial review on April 24, 2014. ECF Nos. 1, 4.

STATEMENT OF FACTS

The facts of the case are set forth in the administrative hearing transcript, the ALJ's decision, and the briefs of the parties. They are only briefly summarized here.

Plaintiff was 47 years old at the date of application and amended date of onset. Tr. 324. He completed high school and one year of college. Tr. 362, 412. His reported work history includes building cabinets. Tr. 362-63. When applying for benefits Plaintiff reported that he stopped working on January 1, 2000 because of his conditions. Tr. 361-62.

STANDARD OF REVIEW

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo, deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as

1 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
2 another way, substantial evidence is such relevant evidence as a reasonable mind
3 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
4 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
5 interpretation, the court may not substitute its judgment for that of the ALJ.
6 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative
7 findings, or if conflicting evidence supports a finding of either disability or non-
8 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d
9 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial
10 evidence will be set aside if the proper legal standards were not applied in
11 weighing the evidence and making the decision. *Browner v. Secretary of Health*
12 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

13 **SEQUENTIAL EVALUATION PROCESS**

14 The Commissioner has established a five-step sequential evaluation process
15 for determining whether a person is disabled. 20 C.F.R. §416.920(a); *see Bowen v.*
16 *Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one through four, the burden of
17 proof rests upon the claimant to establish a prima facie case of entitlement to
18 disability benefits. *Tackett*, 180 F.3d at 1098-99. This burden is met once the
19 claimant establishes that physical or mental impairments prevent him from
20 engaging in his previous occupations. 20 C.F.R. § 416.920(a)(4). If the claimant
21 cannot do his past relevant work, the ALJ proceeds to step five, and the burden
22 shifts to the Commissioner to show that (1) the claimant can make an adjustment to
23 other work, and (2) the claimant can perform specific jobs which exist in the
24 national economy. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94
25 (9th Cir. 2004). If the claimant cannot make an adjustment to other work in the
26 national economy, a finding of "disabled" is made. 20 C.F.R. § 416.920(a)(4)(v).

27 **ADMINISTRATIVE DECISION**

28 On October 17, 2016, the ALJ issued a decision finding Plaintiff was not

1 disabled as defined in the Social Security Act from October 22, 2014 through the
2 date of the decision.

3 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
4 activity since October 22, 2014, the date of application and the amended date of
5 onset. Tr. 95.

6 At step two, the ALJ determined that Plaintiff had the following severe
7 impairments: depression; anxiety-PTSD; substance abuse disorder; diabetes;
8 personality disorder; and shoulder dysfunction. Tr. 95.

9 At step three, the ALJ found that Plaintiff did not have an impairment or
10 combination of impairments that met or medically equaled the severity of one of
11 the listed impairments. Tr. 96.

12 At step four, the ALJ assessed Plaintiff's residual function capacity and
13 determined he could perform light work with the following limitations:

14 he can lift or carry 20 pounds occasionally and 10 pounds frequently;
15 stand or walk for up to 6 hours in an 8-hour workday; sit for 6 hours in
16 an 9-hour workday; he can occasionally reach overhead with right
17 upper extremities; he should avoid exposure to unprotected heights and
18 no more than frequent exposure to moving, dangerous machinery; he
19 can tolerate low-stress work, but avoid task[s] involving dangerous
20 situations; he can perform tasks requiring occasional and routine
21 judgment and normal work decisions; he can maintain attention for 2
22 hours at a time with normal work breaks; he can perform simple, routine
23 tasks, but no production rate or pace work and no tasks requiring critical
concentration; he can tolerate brief, superficial interaction with the
public, occasional supervisor contact and occasional interaction with
coworkers, but no tandem work.

24 Tr. 98. The ALJ identified Plaintiff's past relevant work as cabinet assembly
25 laborer and found that he could not perform this past relevant work. Tr. 103.

26 At step five, the ALJ determined that, considering Plaintiff's age, education,
27 work experience and residual functional capacity, and based on the testimony of
28 the vocational expert, there were other jobs that exist in significant numbers in the

1 national economy Plaintiff could perform, including the jobs of office cleaner I, II,
2 III, electric assembler, and advertising material distributor. Tr. 104. The ALJ
3 concluded that Plaintiff was not under a disability within the meaning of the Social
4 Security Act from October 22, 2014, through the date of the ALJ's decision. Tr.
5 104-05.

6 ISSUES

7 The question presented is whether substantial evidence supports the ALJ's
8 decision denying benefits and, if so, whether that decision is based on proper legal
9 standards. Plaintiff contends the ALJ erred by (1) failing to properly consider his
10 symptom statements, (2) failing to make a proper residual functional capacity
11 determination, and (3) failing to make a proper step five determination. ECF No.
12 13 at 9.

13 DISCUSSION¹

14 1. Plaintiff's Symptom Statements

15 Plaintiff contests the ALJ's determination that his statements concerning the
16 intensity, persistence and limiting effects of his symptoms were not entirely
17 consistent with the medical evidence and other evidence in the record. ECF No. 13
18 at 11-15.

19 It is generally the province of the ALJ to make determinations regarding the
20 reliability of Plaintiff's symptom statements, *Andrews*, 53 F.3d at 1039, but the

21
22 ¹In *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018), the Supreme Court recently held
23 that ALJs of the Securities and Exchange Commission are "Officers of the United
24 States" and thus subject to the Appointments Clause. To the extent *Lucia* applies
25 to Social Security ALJs, the parties have forfeited the issue by failing to raise it in
26 their briefing. See *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161
27 n.2 (9th Cir. 2008) (the Court will not consider matters on appeal that were not
28 specifically addressed in an appellant's opening brief).

1 ALJ's findings must be supported by specific cogent reasons, *Rashad v. Sullivan*,
2 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of malingering,
3 the ALJ's reasons for rejecting the claimant's testimony must be "specific, clear
4 and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v.*
5 *Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General findings are insufficient:
6 rather the ALJ must identify what testimony is not credible and what evidence
7 undermines the claimant's complaints." *Lester*, 81 F.3d at 834.

8 The ALJ supported his decision that Plaintiff's symptom statements were
9 not supported by the record by finding that (1) the statements were not supported
10 by the objective medical evidence, (2) the statements were inconsistent with
11 Plaintiff's reported activities, (3) the statements were inconsistent with the lack of
12 substantiated treating or examining medical source opinion, and (4) the statements
13 were not supported by the minimal and conservative treatment Plaintiff received.
14 Tr. 100-01, 103.

15 Plaintiff challenged the ALJ's decision by asserting that no providers
16 doubted Plaintiff's veracity. ECF No. 13 at 11-15. However, this failed to address
17 the reasons the ALJ provided for rejecting his statements. By failing to challenge
18 the reasons the ALJ gave for rejecting Plaintiff's symptom statements, Plaintiff
19 essentially waived the argument before this Court. *See Carmickle*, 533 F.3d at
20 1161 n.2. The Ninth Circuit explained the necessity for providing specific
21 argument:

22 The art of advocacy is not one of mystery. Our adversarial system relies
23 on the advocates to inform the discussion and raise the issues to the
24 court. Particularly on appeal, we have held firm against considering
25 arguments that are not briefed. But the term "brief" in the appellate
26 context does not mean opaque nor is it an exercise in issue spotting.
27 However much we may importune lawyers to be brief and to get to the
28 point, we have never suggested that they skip the substance of their
argument in order to do so. It is no accident that the Federal Rules of
Appellate Procedure require the opening brief to contain the

1 “appellant’s contentions and the reasons for them, with citations to the
2 authorities and parts of the record on which the appellant relies.” Fed.
3 R. App. P. 28(a)(9)(A). We require contentions to be accompanied by
reasons.

4 *Independent Towers of Wash. v. Wash.*, 350 F.3d 925, 929 (9th Cir. 2003).²

5 Moreover, the Ninth Circuit has repeatedly admonished that the court will not
6 “manufacture arguments for an appellant” and therefore will not consider claims
7 that were not actually argued in appellant’s opening brief. *Greenwood v. Fed.*
8 *Aviation Admin.*, 28 F.3d 971, 977 (9th Cir. 1994).

9 **2. Residual Functional Capacity**

10 Plaintiff challenged the ALJ’s residual functional capacity determination by
11 challenging his treatment of the medical expert’s opinion. ECF No. 9 at 15-17.

12 At the August 18, 2016 hearing, Stephen Rubin, Ph.D. testified that Plaintiff
13 had “depressive disorder, probably mild to moderate,” “an anxiety disorder, at least
14 moderate,” “a personality disorder and certain characteristics which make it
15 difficult for him to interact with others,” and “in the past, he’s had a drug problem
16 which he says now he’s been clean and sober for about seven years.” Tr. 185. He
17 considered listings 12.04, 12.06, 12.08, and 12.09 and found that Plaintiff did not
18 meet or equal any of the listings. Tr. 186. He addressed the B Criteria and ranked
19 Plaintiff as mild in terms of activities of daily living, moderate in terms of social
20 functioning, and moderate in terms of concentration, persistence, and pace and
21 there were no episodes of prolonged decompensation. Tr. 186-87. In terms of a
22 residual functional capacity opinion, Dr. Rubin opined that Plaintiff had a mild
23 limitation with simple instructions and a moderate limitation in complex
24 instructions. Tr. 188. He opined marked difficulties with the public, moderate
25 difficulties with supervisors, and moderate difficulties with peers. *Id.* Upon cross-
26

27 ²Under the current version of the Federal Rules of Appellate Procedure, the
28 appropriate citation would be to FED. R. APP. P. 28(a)(8)(A).

1 examination, Dr. Rubin testified that production-paced work would not be a good
2 situation for Plaintiff. Tr. 190. He also estimated that based on Plaintiff's mental
3 health concerns he would more probably be absent from work two days a month.
4 *Id.*

5 The ALJ gave "great weight to most of the opinions of Dr. Rubin," but then
6 gave no weight to the opinion that Plaintiff would miss one or two days a month.
7 Tr. 102. The ALJ rejected this portion of the opinion because the medical
8 evidence did not show consistent psychological symptomology, examining sources
9 noted only mild psychological symptoms, and Plaintiff remained independent in
10 performing activities of daily living. *Id.*

11 Plaintiff argues that in rejecting this portion of Dr. Rubin's opinion the ALJ
12 failed to consider "that Plaintiff was in therapy and on medications for years and
13 that he and his youngest daughter lived with his mother until her death and that he
14 required help from his oldest daughter not only while he was living with his
15 mother, but after his mother expired." ECF No. 13 at 16. However, Plaintiff's
16 allegations are premised on his symptom statements. Tr. 174-75 (Plaintiff's
17 testimony that prior to therapy he did not leave his home, and that he experienced
18 improvement in the last two years, but he still took his daughter with him.). As
19 addressed above, Plaintiff failed to mount a proper challenge to the ALJ's
20 treatment of his symptom statements. The only citation to the record Plaintiff
21 provided in support of his argument was a January 5, 2017 counseling record that
22 post-dates the ALJ's decision.³ ECF No. 13 at 16 *citing* Tr. 88. Therefore,
23 Plaintiff's argument cannot prevail.

24
25 ³While this new evidence has been made a part of the administrative record,
26 it does not pertain to Plaintiff's condition during the relevant period and, therefore,
27 could not change the outcome of the proceedings below. As such, remand for
28 review by the ALJ is not required. *Mayes v. Massanari*, 276 F.3d 453, 462 (9th

1 Plaintiff failed to specifically address the individual reasons the ALJ
2 provided for rejecting the absenteeism portion of the opinion. ECF No. 13 at 16.
3 Therefore, the Court is not required to address the issue more in depth. *See*
4 *Carmickle*, 533 F.3d at 1161 n.2.

5 **3. Step Five**

6 Plaintiff raised a challenge to the ALJ's step five determination in the list of
7 issues preceding the discussion section of his briefing. ECF No. 13 at 9. However,
8 Plaintiff failed to provide any challenge in the body of his briefing. ECF No. 13.
9 Therefore, the Court will not address this issue. *See Carmickle*, 533 F.3d at 1161
10 n.2.

11 **CONCLUSION**

12 Accordingly, **IT IS ORDERED:**

13 1. Defendant's Motion for Summary Judgment, **ECF No. 14**, is
14 **GRANTED.**

15 2. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is **DENIED.**

16 The District Court Executive is directed to file this Order and provide a copy
17 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Defendant**
18 **and the file shall be CLOSED.**

19 DATED April 22, 2019.

A handwritten signature in black ink, appearing to read "M", is positioned above the judge's name.

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28

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE

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28

Cir. 2001) (remand not required if new evidence would not change hearing
decision).